

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED.	 DATE: 20/06/2024 BRAND AJ
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Case number: 8197/2018

Date: 20 June 2024

In the matter between:

M[...] C[...] T[...]

PLAINTIFF

and

E[...] M[...]T[...]

DEFENDANT

JUDGMENT

BRAND AJ

Introduction

[1] The plaintiff, M[...] C[...] T[...], has been married in community of property to the defendant, E[...] M[...]T[...] since 6 April 1997. They have two children, both of whom have reached majority, although to differing degrees still dependent on their parents.

[2] The plaintiff seeks a decree of divorce and the concomitant division of the joint estate. In addition, he wishes this court to order that he pay the defendant maintenance, but only rehabilitative maintenance for a period of six months from the date of divorce and at an amount of R6,300.00 per month; that he provide the defendant with a road worthy motorcar; that he pay the defendant's contributions to his current medical aid fund for a period of 12 months from the date of the order he seeks; that he remains responsible for any maintenance of the two children, with the defendant contributing as her means objectively permit; and that the defendant pay the costs of suit.

[3] The defendant agrees that a decree of divorce should issue, and the joint estate be divided accordingly. However, she disagrees with several of the other aspects of the order sought. Accordingly, she has brought a counterclaim in the salient parts of which she seeks from the plaintiff payment of maintenance until she either remarries or dies, at an amount of R40,000.00 per month; a road worthy automatic motorcar; that the plaintiff retain her on his medical aid fund and pays for any shortfalls on medical or dental costs, until she remarries or dies; and that the plaintiff pays the costs of suit.

[4] In addition, during the course of the trial before me, she sought an amendment of her counterclaim, the salient parts of which would provide for an order that she is entitled to 50% of the plaintiff's pension benefit as at the time of divorce; that an endorsement be made against the records of the relevant pension interest company or administrator indicating her entitlement to that 50%; that this pension interest company or administrator be ordered to pay her the half share of the pension interest as at divorce, upon her election; and that instead of retaining her on his medical aid, the plaintiff be ordered to pay her medical fund contributions on her current medical aid fund and any shortfall on medical costs, until she either remarries or dies.

[5] In this light, all that remains in dispute in this action and for me to decide, is:

[5.1] The nature, amount, and duration of any maintenance the plaintiff must pay the defendant.

[5.2] The nature, extent, and duration of the plaintiff's duty to carry the

defendant's medical aid costs and pay any shortfalls on medical costs.

[5.3] Whether the plaintiff should give the defendant any roadworthy motorcar upon divorce, or instead an automatic motorcar.

[5.4] Whether the amendment of the counterclaim should be allowed and the orders concerning the pension interest there sought should issue.

[5.5] Who should pay the costs of suit.

[6] These issues should be decided in light of the evidence presented at trial. This trial ran before me for five days during which evidence was presented through several witnesses, and a final, sixth day for closing argument.

[7] Two witnesses gave evidence for the plaintiff: the plaintiff himself and his older brother, R[...] M[...] C[...] T[...]. In turn, there were three witnesses for the defendant: the defendant herself; a private investigator, Alno Crous; and an industrial psychologist, Bernard Oosthuizen.

[8] I address the evidence of these witnesses below in the discussion of the various issues in dispute, as it becomes relevant. However, at the outset it must be stated that both the plaintiff and his brother – but in particular his brother – made a bad impression on this court. Through their demeanour and various inconsistencies in and the inherent improbability of much of their evidence, neither presented as either reliable or credible.

[9] By contrast, the defendant and the other two witnesses who gave evidence on her behalf were good witnesses, presenting both as credible and reliable.

The merits

Maintenance

[10] The parties are agreed that the plaintiff should pay maintenance to the defendant post-divorce. They differ concerning the kind, duration, and amount of maintenance. The plaintiff seeks an order that he pay only rehabilitative maintenance, to the amount of R6,300.00 per month, for six months after the

divorce. The defendant instead seeks permanent maintenance, until she either dies or remarries, to the amount of R40,000.00 per month. Accordingly, I must determine not the question whether maintenance should be paid but what kind of maintenance, to what amount and for how long.

[11] The framework for this court's determination of these questions is set out in section 7(2) of the Divorce Act 70 of 1979 ('the Divorce Act'). This section determines that where divorcing parties fail to agree on maintenance, this court may make any order that is just concerning maintenance, taking into account at least the following factors: 'the existing or prospective means of the parties; their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage', and any order for redistribution in terms of section 7(3).

[12] These factors listed in section 7(2) must be considered by a court determining what is just concerning maintenance; and a court may also consider other factors it finds relevant.¹ Those factors that are considered must be taken together rather than in isolation, to determine what is just in the circumstances of the particular case.² Overall, the court must endeavour to reach a resolution that is fair or just to both parties in the circumstances, taking account of the need for maintenance of the party claiming it³ and the capacity of the other party to pay it.⁴

[13] Concerning the choice between so-called 'rehabilitative' maintenance and permanent maintenance that the parties require this court to make, the point of departure is, as Ms Richter for the plaintiff urged me to consider, that our courts favour a so-called 'clean break' divorce, with neither party remaining dependent upon the other post-divorce.⁵ Temporary, rehabilitative maintenance is awarded where the party seeking maintenance has been in the marriage for such time that

¹ *Botha v Botha* 2009 (3) SA 89 (W) at para [49]; *Grasso v Grasso* 1987 (1) SA 48 (C) at p 52F.

² *Grasso* (above) at p 52F.

³ *EH v SH* 2012 (4) SA 164 (SCA) at para [13].

⁴ *V v V* (52799/2016) [2017] ZAGPPHC 545 (30 August 2017) at para [11]; *Buttner v Buttner* [2005] ZASCA 86; 2006 (3) 23 (SCA) at para [36]; *Botha* (above) at para [46].

⁵ *Beaumont v Beaumont* 1987 (1) SA 967 (A) at pp 992-993; *Katz v Katz* 1989 3 SA 1 (A) at p 11; *Archer v Archer* 1989 2 SA 885 (E) at pp 894-895; M de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75.

s/he has effectively been removed from the labour market, but is young or otherwise capable enough still that s/he can be trained or retrained to enable entry into economic activity with which to become self-sufficient.⁶ Permanent maintenance in turn is awarded where the party seeking maintenance is for whatever reason incapable of again becoming self-sufficient.⁷

[13] I proceed to consider each of the factors I am required to in terms of section 7(2), in light of the evidence presented. First, the existing or prospective means of the parties.

[14] The plaintiff receives approximately R40,000.00 per month income from rental properties he co-owns with his brother. In addition, he receives financial and other forms of support from his brother (much of it unspecified), such as being allowed to live in a townhouse owned by his brother for free. These additional forms of support enable him to meet his monthly expenses, which on his own calculation amounts to more than R70,000.00 per month. These monthly expenses presumably include his current maintenance payments to the defendant.

[15] Both the plaintiff and his brother in evidence spent much time trying to convince this court that his current means, and in particular that portion of it that he receives in the form of gratuities from his brother, were precarious. They did so by both testifying that the plaintiff, although he did work for his brother, was not employed by him and so received no remuneration for the work he did. The plaintiff's brother explained that he provided these other forms of support because his father had asked him to look after him; and that he did so 'because he is my brother'. But the plaintiff's brother several times darkly hinted that he is reaching the end of his tether concerning the plaintiff and may start cutting back on his support, thus reducing the means at his disposal.

[16] These claims are not credible. However, apart from the plaintiff and his brother making them further impugning their credibility as witnesses, these claims matter not. On the facts before this court, the plaintiff's current means – which are

⁶ *Kooverjee v Kooverjee* 2006 (6) SA 127 (C) at p 137; *Grasso* (above) at p 58C-G.

⁷ *Kooverjee* (above) at p 137.

likely to persist – amount to more than R70,000.00 per month. Crucially, these means currently already cater for payment of maintenance to the defendant. Once the division of the joint estate occurs, the plaintiff's means are likely also to improve, if only because much of his current monthly expenses relate to the upkeep of the family home and similar liabilities.

[17] By contrast, the defendant's means currently consist of the income she generates from her Pilates classes, which amounts to R3,000.00 per month. Although she is co-owner of the family home in which she also lives, it is not currently at her disposal as an asset and will only become so once the division of the joint estate has occurred.

[18] This means that, apart from the R3,000.00 per month she earns with Pilates classes, the defendant has no other means at her disposal to meet her needs. Should this court order that the defendant is entitled to 50% of the plaintiff's current pension interest, she could elect to have that paid out now, but that is also not likely to be enough to meet her expenses. She is in other words almost entirely dependent on the maintenance the plaintiff currently pays.

[19] Concerning the parties' present and future earning capacity, it is clear that the plaintiff has sufficient income to meet his current needs of more than R70,000.00 per month. It matters not whether that portion of his income apart from the R40,000.00 per month rental income is styled as obtained through gratuities from his brother or remuneration for work done. The simple fact is that he receives upwards of R70,000.00 per month in income, which is sufficient to cover his self-stated expenses, including current maintenance payments.

[20] The defendant in turn is not a wife who has not worked for whom one must now calculate or speculate a future earning capacity to determine whether rehabilitative maintenance will be appropriate. Instead, she is working and earning currently: R3,000.00 per month for her Pilates classes. The only question is whether she can substantially increase her income, so making her less dependent on maintenance.

[21] To this the answer must be no. Apart from her addiction and related depression, which already impacts her ability to work quite severely (not only for physical reasons but also for the reputational difficulties they have on her own evidence caused her) she suffers from various physical impairments that limit her mobility and range of movement and so her capacity to present Pilates classes. At her age – 56 – her physical condition is likely to deteriorate over time, rather than improve. Ms Richter's efforts to argue to the contrary, that she could dramatically increase her income by taking on more and larger classes, fail to take account of the uncontroverted evidence of her physical and mental impairments and the extent to which that limits her capacity for more work and ability to generate more work. This was also confirmed by the evidence of Mr Bernard Oosthuizen, the industrial psychologist, who was convincing despite Ms Richter's valiant attempts to impugn his testimony.

[22] On cross examination, Ms Richter vigorously probed the defendant on why she did not better utilise the family home and her Pilates studio to generate income, through rental. The defendant was convincing in response: that the family home was in disrepair and therefore not capable of being rented out (and that, should she rent it out, she would have to find another place to live, for which she would also have to pay), and that renting out the Pilates studio would entail letting strangers into her home on a regular basis, including to use her bathroom, something that she was understandably not willing to do (apart from privacy issues, this would potentially place her at physical risk). I conclude that these potential avenues for additional income are in fact not options.

[22] The scale of her financial difficulties also bears mentioning. As Mr Haskins SC for the defendant pointed out, even were the defendant to double her earnings from whatever source, or even triple it (something she is manifestly incapable of doing), this would hardly make a dent in her financial need and while reducing somewhat, would still not obviate the need for maintenance.

[23] In this light I conclude that the defendant's earning capacity – both current and future – falls far short of meeting her needs, so that a substantial need for payment of maintenance remains currently; and that there are no prospects of her

earning capacity improving in future.

[24] The parties' respective financial needs and obligations are clear – and neither disputed the other's, so that both must stand as alleged. The plaintiff refers to just over R70,000.00 per month in needs and obligations. This amount is covered by his rental income, and the additional gratuities he receives from his brother.

[26] The defendant calculates her monthly financial needs and obligations at R46,727.65 per month. Given that her income is a monthly amount of +-R3,000.00, this leaves the defendant with a shortfall and a consequent dependence on maintenance of R43,727.65.

[27] The plaintiff is 51 years old and the defendant 54. While certainly not yet elderly, neither, and especially not the defendant can be considered to be young still. They have been married for close on 28 years. The marriage can be described as of long duration.

[28] The age of the parties is, as pointed out above, relevant to determining their earning capacities and so to the question whether they should receive rehabilitative or permanent maintenance. That is, the older the party claiming maintenance is, the smaller the future earning capacity and the stronger the claim for permanent instead of rehabilitative maintenance.⁸

[29] This applies in particular to the defendant, given that her income depends on her capacity for physical movement and flexibility, both of which with her are already impaired and are likely to become further impaired in future.

[30] The duration of the marriage has also been held to be relevant to determining whether rehabilitative or permanent maintenance is apposite. As with more advanced age, a longer enduring marriage also indicates permanent instead of rehabilitative maintenance.⁹ The fact that the parties here have been married for such a long time – 28 years – in other words works in favour of the defendant's claim

⁸ *Kooverjee* (above) at p 137, 139B; *Kroon v Kroon* 1986 (4) 616 (E) at p 622.

⁹ *Kroon* (above) at p 622; *Grasso* (above) at p 52-53; *Rousalis v Rousalis* 1980 (3) 446 (C) at p 450.

for permanent maintenance.

[31] In *NB v NB* it was held that the aim in divorce should be for both parties to maintain the standard of living they did during the marriage. However, this aim is necessarily conditioned by affordability: with two households being made from one, costs always escalate, so that expectations of living standards must be tempered accordingly. The court further held that the question of living standards is always an objective one – to be determined in light of the living standards of the parties before the court and not an objective standard of reasonableness.¹⁰

[32] The plaintiff and defendant were agreed that during their marriage they maintained a relatively high standard of living: they had a large house with swimming pool; two cars; regularly went on holiday abroad; and twice per year in South Africa; and dined out with their children at least once a week. Both plaintiff and defendant's living standards deteriorated significantly since they separated and have been living apart. The defendant's claim for permanent maintenance has been calculated not even to regain the living standard she was used to when still living with the plaintiff and her children. Instead, it is aimed at maintaining her current, much reduced living standard. As such, it does not seem to be pitched at an unreasonable level.

[33] While the conduct of the parties related to the breakdown of the marriage might be relevant to determination of maintenance, in this matter it is not so. Both parties accused the other of instances of misconduct, but nothing struck me to be of such degree or nature that it should be considered in determining amount, duration or kind of maintenance.

[34] To conclude on the question of maintenance: the defendant has proven on a balance of probabilities that she indeed is in need of permanent and not only temporary rehabilitative maintenance. She has shown an egregious shortfall between her income and financial needs and obligations; that she is unable to increase her earnings and that they are likely to decrease with time and as she ages; and that the plaintiff is able to pay her maintenance.

¹⁰ *NB v NB* 2010 (3) 220 (SGJ) at 230I-J.

[35] Two other factors raised by Mr Haskins in closing argument are pertinent. The first is that the plaintiff is currently paying maintenance at close to the amount now claimed, seemingly without difficulty. The second is that an order for rehabilitative maintenance for a period of six months, as the plaintiff seeks, is final in effect. Once those six months have passed, the defendant's entitlement to any maintenance would have ended. By contrast, an order for permanent maintenance is not. The plaintiff is always free if circumstances have changed sufficiently to approach the Court for an order varying his maintenance liability. This will, for example, particularly be the case when the division of the joint estate is concluded.

[36] On maintenance, in this light I conclude that the defendant is entitled to maintenance to the amount of R40,000.00 per month, until she either dies or remarries.

The motorcar

[37] The sticking point between the parties on the motorcar is slight. The plaintiff offers any road worthy motorcar of his choice. The defendant, for reasons of her medical problems and mobility, prefers an automatic motorcar.

[38] The defendant's evidence on her medical problems was neither seriously nor successfully challenged or disputed. It is therefore uncontested that it would be easier for her to drive an automatic than a manual motorcar. I conclude that she is entitled to an order to that effect.

The medical aid

[39] The gulf between the parties is here wider. The plaintiff offers to continue paying the medical aid fund contributions relevant to the defendant for a period of 12 months from divorce. The defendant instead claims that the plaintiff pay the contributions for her present medical aid fund, until she either dies or remarries, as well as any shortfalls or other amounts on medical or dental expenses.

[40] The plaintiff has been paying the medical aid contributions for the defendant

all along. He has demonstrated the capacity to do so. The defendant is manifestly incapable of doing so either from income generated herself or from the maintenance she will be awarded in this matter. Should the plaintiff not be ordered to pay the medical aid until the defendant dies or remarries, there would be a need to increase the amount of maintenance to cover the medical aid contributions, as the already proven need of the defendant will have increased.

[41] Accordingly, also here I conclude in favour of the defendant.

Amendment of the counter claim – pension benefit

[42] The application for amendment of the counter claim was not opposed and must therefore be granted.

[43] During the course of the hearing, the plaintiff admitted that his pension benefit was part of the joint estate and will therefor in any event be divided when the joint estate is divided. In doing so, he by implication also consented to the orders the defendant seeks concerning the pension benefit. Those are accordingly also to be granted.

Costs

[44] It goes without saying that costs remain in the discretion of the court, which discretion must be exercised judicially.¹¹

[45] Nonetheless, it is customary that costs are awarded to the successful party in litigation, unless there is good reason not to do so.

[46] Section 10 of the Divorce Act determines that a court in a divorce action is not bound to award costs to the successful party but may issue any order concerning costs that is just, including an order apportioning costs between the parties.

¹¹ *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) at para [3].

[47] In this matter the defendant has been wholly successful. There seem no factors indicating departure from the rule of thumb to award the successful party costs.

[48] Instead, there are several factors indicating the opposite: the plaintiff elected to come to court when essentially only the amount, kind and duration of maintenance was at issue; Mr Haskins pointed out that the defendant was forced to issue several subpoenas to obtain documents relevant to the litigation because the plaintiff failed to produce them; and the defendant made an unconditional offer in terms of rule 34, which was rejected.

[49] In this light cost should be awarded to the defendant, with the plaintiff paying those costs from his share of the divided joint estate.

[50] In the circumstances, the following order is made:

1. A decree of divorce is hereby granted dissolving the marriage between the parties.
2. Leave is granted to the defendant to amend her pleadings as follows:
 - 2.1. by deleting the words *"and had 4 (four) miscarriages"* in paragraph 4.4 of the defendant's counterclaim.
 - 2.2. by replacing the existing prayer 5 of the defendant's counterclaim with the following:
"An order that the plaintiff pays the premiums required to retain the defendant on defendant's present medical aid scheme and pays for any shortfalls or any other amounts required for medical, dental, hospital and related treatment until the death or remarriage of the defendant, whichever event may first occur."
 - 2.3. by renumbering prayers 9 and 10 of defendant's counterclaim to be prayers "10" and "11" and by adding the following in as prayer "9":
 - "9.1 The defendant shall be entitled to 50% of the plaintiff's pension interest held at Universal Retirement Annuity with policy number: 770004899490, as at date of divorce.*
 - 9.2 That an endorsement be effected against the records of the said pension interest company and/or administrator evidencing*

the defendant's entitlement in terms hereof.

9.3 That the aforesaid pension interest company and/or administrator be authorised to make payment to the defendant of the defendant's half share of such pension interest calculated as at date of divorce upon her election forthwith."

3. There shall be a division of the joint estate.
4. The defendant shall be entitled to 50% of the plaintiff's pension interest held at Universal Retirement Annuity with policy number 770004899490, as at date of divorce.
5. An endorsement shall be effected against the records of the said pension interest company and/or administrator evidencing the defendant's entitlement in terms hereof.
6. The aforesaid pension interest company and/or administrator is authorised to make payment to the defendant of the defendant's half share of such pension interest calculated as at date of divorce upon her election forthwith.
7. The plaintiff shall pay maintenance to the defendant at the rate of R40,000.00 per month on or before the first day of every month until the death or remarriage of the defendant, whichever event may first occur.
8. The plaintiff shall pay the premiums required to retain the defendant on the defendant's present medical aid scheme and pay for any shortfalls or any other amounts required for medical, dental, hospital and related treatment until the death or remarriage of the defendant, whichever event may first occur.
9. The Plaintiff shall provide the defendant with an automatic roadworthy motor vehicle upon date of divorce, as a further contribution towards her maintenance.
10. Costs of suit, payable out of the plaintiff's half share of the joint estate.

JFD Brand
Acting Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES

Counsel for the plaintiff:	Ms M Richter
Instructed by:	Paul Casasola and Associates
Counsel for the third parties:	Mr ML Haskins SC
Instructed by:	De Oliveira Serrao Attorneys
Date of the Hearing:	3-7 March and 15 March 2024
Date of Judgment:	20 June 2024